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DISTRICT OF HAWAII

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CV 09-00026 HG BMK

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HAWAI'I, and KAHEA, THE  
HAWAIIAN-ENVIRONMENTAL  
ALLIANCE

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

LOST FISH COALITION,  
CONSERVATION COUNCIL FOR  
HAWAI'I, and KAHEA, THE  
HAWAIIAN-ENVIRONMENTAL  
ALLIANCE,

Plaintiffs,

vs.

WESTERN PACIFIC REGIONAL  
FISHERY MANAGEMENT  
COUNCIL, NATIONAL OCEANIC  
AND ATMOSPHERIC  
ADMINISTRATION FISHERIES  
PACIFIC ISLANDS REGIONAL  
OFFICE, and the UNITED STATES  
DEPARTMENT OF COMMERCE,

Defendants.

Civ. No. CV 09-00026 HG BMK

COMPLAINT; SUMMONS

Plaintiffs, LOST FISH Coalition, Conservation Council for Hawai'i  
and KAHEA, the Hawaiian-Environmental Alliance (collectively referred to  
as "LOST FISH") allege as follows:

**INTRODUCTION**

1. This action is premised upon - and consequent to - violations of  
both the Freedom of Information Act, 5 U.S.C. § 552 *et. seq.* ("FOIA"), and

the Administrative Procedure Act, 5 U.S.C. § 701 *et. seq.* (“APA”). It challenges the unlawful failure of defendants Western Pacific Regional Fishery Management Council (“Wespac”), National Oceanic and Atmospheric Administration Fisheries Pacific Islands Regional Office (“NOAA”), and U.S. Department of Commerce to respond to LOST FISH’s FOIA request in the manner mandated by FOIA. On November 14, 2007, LOST FISH submitted a FOIA request to Wespac seeking basic Wespac budget, grant, and contract information. This request was generated as part of LOST FISH’s ongoing oversight of Western Pacific federal and state water ocean conservation issues in their work to help restore and protect the health of the Western Pacific Ocean environment, and the people who rely on a healthy and diverse Western Pacific environment.

2. Wespac has not provided any documents to LOST FISH in response to the FOIA request. The National Oceanic and Atmospheric Administration did contact LOST FISH regarding the FOIA request, purporting to offer a response on Wespac’s behalf. NOAA provided some information to LOST FISH and requested that LOST FISH refine the FOIA request. LOST FISH did this on April 7, 2008. Since that date, NOAA has been unresponsive to LOST FISH’s repeated communications and attempts to receive the requested documents.

3. On June 10, 2008, LOST FISH filed an administrative appeal with the Department of Commerce (NOAA's parent agency) of NOAA's effective denial of the FOIA. As of the date this Complaint was filed, the Department of Commerce has not issued a determination resolving this administrative appeal.

4. Defendants are unlawfully withholding public disclosure of information sought by LOST FISH, information to which it is entitled and for which no valid exemption applies. Moreover, defendant Department of Commerce failed to comply with the statutory mandates and deadlines imposed by FOIA through its failure to provide a final determination resolving LOST FISH's FOIA appeal within the time required by law. LOST FISH seeks declaratory relief that defendants have violated the FOIA and APA. LOST FISH also seeks injunctive relief directing defendants to promptly provide LOST FISH with the requested material.

#### **JURISDICTION, VENUE AND BASIS FOR RELIEF**

5. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under the FOIA, the APA and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

6. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district.

7. Declaratory relief is appropriate under 28 U.S.C. § 2201 and 5 U.S.C. § 552(a)(4)(F).

8. Injunctive relief is appropriate under 28 U.S.C. § 2202.

### **PARTIES**

9. LOST FISH Coalition is a grass-roots organization, based on the West Coast of the Island of Hawai‘i. LOST FISH Coalition was organized to ensure that Hawai‘i reefs are not denuded by collectors catching and selling wild reef fishes to be sold in the aquarium trade. LOST FISH Coalition tracks the state and federal fishery management process, and frequently testifies before and provides written testimony to Wespac on fishery management and Wespac operation issues. LOST FISH Coalition also disseminates information about Wespac management and operations through reports, newsletters, alerts, and media. <http://www.lostfishcoalition.org/>. LOST FISH Coalition submitted the FOIA request and appeal at issue in this case.

10. The Conservation Council for Hawai‘i is a grassroots environmental organization dedicated to protecting native Hawaiian plants, animals, and ecosystems for future generations through policy-making, advocacy, education, and service. It is the Hawai‘i affiliate of the National Wildlife Federation. The Conservation Council for Hawai‘i disseminates

information about federal fishery management through its newsletters, media, reports and alerts. <http://conservehi.org/pg-newsletters/cch-newsletters.html>. The Conservation Council for Hawai'i is a party to the FOIA request and appeal at issue in this case.

11. KAHEA, the Hawaiian-Environmental Alliance ("KAHEA"), is a community-based organization working to improve the quality of life for Hawai'i's people and future generations through the revitalization and protection of Hawai'i's unique natural and cultural resources. KAHEA advocates for the proper stewardship of our resources and for social responsibility by promoting multi-cultural understanding and environmental justice, and disseminates to the public information about federal ocean management. <http://www.kahea.org/>. KAHEA is a party to the FOIA request and appeal at issue in this case.

12. Defendant Western Pacific Regional Fishery Management Council is a federal fishery management advisory body and one of eight regional fishery management councils created by the Magnuson-Stevens Fishery Conservation and Management Act of 1976. It resides in the executive branch of the United States government. Wespac develops and recommends fishery management measures, subject to review, approval and implementation by the National Oceanic and Atmospheric Administration,

Fisheries Service. Wespac is in possession and control of the records and documents sought by LOST FISH, its records and documents are considered federal government property, and it is subject to FOIA pursuant to 5 U.S.C. § 552(f); 50 C.F.R. 600.150, 600.155.

13. Defendant National Oceanic and Atmospheric Administration Fisheries Pacific Islands Regional Office (“NOAA”) is a sub-agency within the United States Department of Commerce. NOAA is responsible for coordinating with Wespac on FOIA responses that are sent to Wespac. 50 C.F.R. 600.155.

14. Defendant United States Department of Commerce is responsible for timely deciding administrative appeals related to FOIA requests made to NOAA. 5 U.S.C. § 552(a)(6)(C); 15 C.F.R. 4.10.

### **STATEMENT OF OPERATIVE FACTS**

15. Wespac executive director Kitty Simonds has repeatedly stated that Wespac contracts and other records are freely available to the public at the Wespac library during Wespac business hours. Yet when LOST FISH attempted to access this information in the Fall of 2007, through direct visits to the Wespac library during business hours and subsequent non-FOIA requests to Ms. Simonds, Ms. Simonds repeatedly denied LOST FISH access to the information.

16. LOST FISH subsequently submitted a FOIA request to Wespac on November 14, 2007 seeking the following documents: yearly budgets for staff compensation 2005-09; Wespac contracts in "Liaison," "Operational Public Education," "Operational Professional Services Temporary Help," and "Other Services" categories; Wespac grant final reports, progress reports, and Community Development Program grant awards for the years 2006-2008; grant information from NOAA to Wespac, including "performance reports" and other grant-related and required communications; and records related to the Puwalu series of meetings.

17. Wespac has not responded to LOST FISH in any way concerning the FOIA request.

18. A NOAA FOIA officer contacted LOST FISH by telephone at the end of December, 2007 regarding the Wespac FOIA request. NOAA assigned the FOIA request identification number 2008-00090. In March 2008 NOAA provided an "interim release of records" consisting solely of documents that were presented to other FOIA requesters in response to separate FOIA requests. According to NOAA there was an overlap between the documents responsive to the LOST FISH FOIA request to Wespac and the other unidentified FOIA requests, and proceeding in this manner could help respond to and narrow LOST FISH's request.



19. As agreed to with NOAA, LOST FISH used the interim FOIA response documents to refine and pare down LOST FISH's FOIA request, which it transmitted to NOAA by email dated April 7, 2008.

20. LOST FISH thereafter sent multiple emails to NOAA inquiring as to the status of the FOIA response and when it could expect the documents. As of the date this Complaint was filed, LOST FISH has received no response to these requests.

21. The deadline to issue a final determination on LOST FISH's FOIA request had passed by June of 2008.

22. As the deadline for a FOIA response was long-past, and LOST FISH had not received an adverse determination on the FOIA request, *see* 15 C.F.R. 4.7(b), LOST FISH considered NOAA's failure to respond as a constructive denial of the FOIA. On June 10, 2008, LOST FISH therefore filed an administrative appeal with the Department of Commerce of this effective denial pursuant to 15 C.F.R. 4.10.

23. FOIA requires an agency to issue a final determination resolving an appeal within twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(ii). This deadline has also lapsed, and as of the date this complaint was filed there has been no determination on LOST FISH's administrative appeal.

24. LOST FISH has fully exhausted all administrative remedies required by FOIA. 5 U.S.C. §§ 552(a)(6)(A), (a)(6)(C).

25. LOST FISH has been required to expend costs and to obtain the services of legal counsel to prosecute this action.

## **CAUSES OF ACTION**

### **COUNT I**

#### **WESPAC VIOLATION OF THE FREEDOM OF INFORMATION ACT: CONSTRUCTIVE DENIAL**

26. The allegations made in all preceding paragraphs are re-alleged and incorporated by reference herein.

27. LOST FISH has a statutory right to the records it seeks, and there is no legal basis for defendants to assert that any of FOIA's nine disclosure exemptions, *see* 5 U.S.C. § 552(b)(1)-(9), apply.

28. LOST FISH has a statutory right to have defendants process its FOIA request and appeal in a manner which complies with FOIA.

29. Defendant Wespac violated LOST FISH's rights in this regard by not responding to LOST FISH's FOIA request.

30. LOST FISH is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

**COUNT II**

**NOAA VIOLATION OF THE FREEDOM OF INFORMATION ACT:  
CONSTRUCTIVE DENIAL**

31. The allegations made in all preceding paragraphs are re-alleged and incorporated by reference herein.

32. LOST FISH has a statutory right to the records it seeks, and there is no legal basis for defendants to apply any of FOIA's nine disclosure exemptions, *see* 5 U.S.C. § 552(b)(1)-(9).

33. LOST FISH has a statutory right to have defendants process its FOIA request and appeal in a manner which complies with FOIA.

34. Defendant NOAA violated LOST FISH's rights in this regard by not responding to LOST FISH's FOIA request.

35. LOST FISH is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

**COUNT III**

**WESPAC VIOLATION OF THE  
FREEDOM OF INFORMATION ACT:  
RESPONSE DEADLINE**

36. The allegations made in all preceding paragraphs are re-alleged and incorporated by reference herein.

37. LOST FISH has a statutory right to have Wespac make a final determination on its FOIA request in a manner which complies with the law. LOST FISH's rights in this regard were violated when Wespac unlawfully delayed its response to the FOIA request beyond the deadline imposed by the FOIA, *see* 5 U.S.C. § 552(a)(6)(A).

38. LOST FISH is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

#### **COUNT IV**

#### **NOAA VIOLATION OF THE FREEDOM OF INFORMATION ACT: RESPONSE DEADLINE**

39. The allegations made in all preceding paragraphs are re-alleged and incorporated by reference herein.

40. LOST FISH has a statutory right to have NOAA make a final determination on its FOIA request in a manner which complies with the law. LOST FISH's rights in this regard were violated when NOAA unlawfully delayed its response to the FOIA request beyond the deadline imposed by the FOIA, *see* 5 U.S.C. § 552(a)(6)(A).

41. LOST FISH is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

**COUNT V**

**DEPARTMENT OF COMMERCE VIOLATION OF THE  
FREEDOM OF INFORMATION ACT:  
APPEAL DETERMINATION DEADLINE**

42. The allegations made in all preceding paragraphs are re-alleged and incorporated by reference herein.

43. LOST FISH has a statutory right to have the Department of Commerce process its FOIA administrative appeal in a manner which complies with the law. LOST FISH's rights in this regard were violated when the Department of Commerce unlawfully delayed its response to its appeal beyond the twenty working-day response deadline imposed by the FOIA, *see* 5 U.S.C. § 552(a)(6)(A)(ii).

44. LOST FISH is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

**COUNT VI**

**ALL DEFENDANTS VIOLATION OF THE  
ADMINISTRATIVE PROCEDURES ACT**

45. The allegations made in all preceding paragraphs are re-alleged and incorporated by reference herein.

46. Defendants have failed to act in an official capacity under color of legal authority by failing to comply with the mandates of FOIA consequent to their effective denial of LOST FISH's FOIA request.

47. Defendants have unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to their failure to release all documents responsive to LOST FISH's FOIA request or to timely decide the administrative appeal.

48. LOST FISH has been adversely affected and aggrieved by the defendants' failure to comply with the mandates of FOIA. Defendants' refusal to release the records or timely decide the administrative appeal has injured LOST FISH's interests in the public oversight of governmental operations and constitute violation of defendants' statutory duties under the APA.

49. Defendants' actions constitute agency action unlawfully withheld and unreasonably delayed and are therefore actionable pursuant to the Administrative Procedures Act, 5 U.S.C. 706(1).

50. Alternatively, defendants' failure to disclose documents and/or timely decide the administrative appeal is in violation of FOIA's statutory mandates and is therefore arbitrary, capricious, an abuse of discretion and not in accordance with law, and is therefore actionable pursuant to the APA, 5 U.S.C. § 706(2).

51. LOST FISH is entitled to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 702,706.

52. LOST FISH is entitled to costs of disbursements and costs of litigation, including reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C.S. § 2412.

### **REQUEST FOR RELIEF**

WHEREFORE, LOST FISH requests that this Court:

1. Order defendants to immediately commence disclosure of the requested information.
2. Declare the failure of defendants Wespac and NOAA to disclose the documents requested by LOST FISH to be unlawful under FOIA, 5 U.S.C. § 552(a)(4)(A)(iii); constitute agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1); and/or arbitrary, capricious, an abuse of discretion and not in accordance with law, 5 U.S.C. § 706(2).


3. Declare the failure of defendants Wespac and NOAA to timely make a final determination to LOST FISH's FOIA request to be unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A);

4. Declare the failure of defendant Department of Commerce to timely make a determination on LOST FISH's administrative appeal to be unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(ii); constitute agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1); and/or arbitrary, capricious, an abuse of discretion and not in accordance with law, 5 U.S.C. § 706(2).

5. Award LOST FISH its costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a) (4)(E) and 28 U.S.C. § 2412.

6. Grant such other and further relief as the Court may deem just and proper.

DATED: Honolulu, Hawaii, January 15, 2009.



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